1979

State of Utah v. Robert Dennis Eagle : Brief of Respondent

Utah Supreme Court

RONALD J. YENGICH
44 Exchange Place
Salt Lake City, Utah 84111

G. FRED METOS (Of Counsel)
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111

Attorneys for Appellant

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16189
ROBERT DENNIS EAGLE,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from conviction of theft, in violation of Utah Code Ann. § 76-6-404 (1953), as amended, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge, presiding.

DISPOSITION IN THE LOWER COURT

The appellant was charged with the offense of theft, a Class A Misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1953), as amended (R.10). The appellant was tried by a jury and convicted of the offense as charged on August 22, 1978 (R.13,14). On November 22, 1978, the appellant was sentenced to six months in the Salt Lake County Jail (R.106).

Notice of appeal was timely filed on December 15, 1978, and bail was set on December 19, 1978 (R.111,114).

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the conviction rendered by the jury in the court below.

STATEMENT OF THE FACTS

On March 25, 1978, the appellant and Luke Myles entered a Z.C.M.I. store located on Main Street and South Temple in Salt Lake City. They were seen in the Men's Suit Department shortly before 6:00 p.m., the store's closing time (R.126). Mr. Myles was carrying a raincoat which he subsequently gave to the appellant (R.129,130).

Clarence Duwayne Price, a security guard for Z.C.M.I., saw Myles stand at the end of a suit rack at a place in the store where two such racks stood side-by-side (R.130); see also Exhibit 1-S for store's floor plan). The appellant went in-between the racks on his knees, took two suits from the racks and stuffed them inside the coat (R.131). The appellant then handed the coat to Myles (R.131).

The two men did not go to the cash register customarily used to purchase items from the suit department (R.131,140). Instead, they walked past the register and on toward the sporting goods department, still passing the

registers (R.132). When the appellant and Myles saw that security personnel were pursuing them and that confrontation was imminent, Myles dropped the suits. Mr. Price grabbed the appellant in a bear-hug and the appellant yelled for Myles to run (R.136). At trial it was shown that the merchandise involved was well over $100 in valud (Exhibits 4 and 5; R.135-139).

After each side had presented its case, defense counsel made a motion out of the presence of the jury to have the theft charge dismissed (R.150). The court denied the motion stating "that the evidence in the case supported the necessary elements of theft" (R.158). A directed verdict for the defendant was also requested and denied (R.163).

Jury instructions were discussed in chambers and, at that time, both parties made several exceptions. Specifically, appellant excepted to the Court's Instruction No. 10 as a comment on the evidence (R.57,161,162). The instruction stated:

> . . . A person's state of mind is not always susceptible of proof by direct and positive evidence, and, if not, may ordinarily be inferred from acts, conduct, statementsor circumstances.

Appellant also excepted to the court's failure to give an instruction on reasonable alternative hypothesis

(Appellant's Proposed Insturction No. 6, R. 37, 162). The court had refused to give this instruction since such an instruction is only proper where all the evidence is circumstantial and because there had been evidence at trial which was direct and positive (R.163).

The court also refused to give Appellant's Proposed Insturction No. 7 regarding joint operation of act and intent (R.38,162). The court reasoned that since state of mind was an essential element of the offense, it was only necessary to define it as an element and to state what the law is regarding state of mind. Additional information was not required (R.164).

Appellant's Supplemental Instruction No. 3 on withdrawal from criminal activity was not given to the jury (R.46). Appellant duly excepted and the court replied that such an instruction was not supproted by the "facts and circumstances of the case" (R.164).

During closing arguments, counsel for the appellant dealt at length with the fact that the defendant had failed to take the stand. Counsel explained to the jury that the reason the defendant had not taken the stand was that it had been counsel's decision as the accused's attorney (R.176). Counsel reasoned that there was no need for appellant to testify since he could have added nothing to the evidence (R.176).

In response to this argument, the State referred to the defendant's failure to take the stand. The defense objected but the court stated:

> He [counsel for appellant] has dealt at some length about that and I will let you respond in some way. You know what the limitations are and don't go beyond that.

(R.187). The prosecutor attempted to rebut the argument that the defendant could have added nothing by testifying. An objection was made and the court then probhibited any further comment (R.187).

A motion for mistrial, based on the prosecutor's closing comments, was made by appellant (R.189). The court denied the motion stating that the prosecutor's comment was not even harmless error (R.190).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO SUBMIT APPELLANT'S PROPOSED INSTRUCTIONS.

This court has set the standard for determining when an instruction must be given to a jury:

> It is admitted that the defendant is entitled to have the jury instructed on his theory of the case if there is any substantial evidence to justify giving such an instruction.

State v. Johnson, 112 Utah 130, 185 P.2d 738, 743, 744 (1947). See also State v. Smith, 571 P.2d 578 (Utah 1977).

In addition, an instruction should not be given when it is not an accurate statement of the law.

At trial the appellant requested several instructions and now claims that the failure to submit his Proposed Insturction Nos. 6 and 7 and Supplemental Insturction No. 3 was error.

A

APPELLANT'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 3 WAS CORRECTLY DENIED BECAUSE IT IS NOT AN ACCURATE STATEMENT OF THE LAW AND IS UNSUPPORTED BY THE FACTS.

Appellant's Proposed Supplemental Instruction No. 3 is allegedly based upon Utah Code Ann. § 76-2-307 (1953), as amended, which reads:

> Voluntary Termination of Efforts Prior to Offense.--It is an affirmative defense to a prosecution in which an actor's criminal responsibility arises from his own conduct or from being a party to an offense under section 76-2-201 [76-2-202] that prior to the commission of the offense, the actor voluntarily terminated his effort to promote or facilitate its commission and either:
>
> (1) Gave timely warning to the proper law enforcement authorities or the intended victim; or
>
> (2) Wholly deprives his pri · efforts of effectiveness in the commissio..

The appellant's instruction stated that the defendant would be "not guilty" if the jury found from the evidence that the defendant wholly deprived his prior efforts in the commission of the offense of theft of any effectiveness (R.46).

This is not an accurate statement of the law because, in addition to finding that the defendant wholly deprived his efforts of effectiveness the jury must also find that the defendant voluntarily terminated his effort to commit the offense.

In State v. Smith, this Court outlined the requirements of Section 76-2-307:

> For a defendant's actions to be considered as a voluntary termination under the statute, he must show (1) that he voluntarily terminated his efforts prior to the commission of the offense; and (2) gave timely warning; or (3) wholly deprived his prior efforts of effectiveness.

571 P.2d at 580.

In the case at bar, the appellant did not voluntarily terminate his actions. Rather, the facts show that the proximity of the security personnel caused the termination of the offense (dropping the suits). Thus, had capture not been quite so immiment, the appellant would never had "terminated" his efforts. It cannot be said that the termination was in any way "voluntary" because appellant only abandoned the goods when he realized there was no chance of escaping with them.

Furthermore, appellant's proposed instruction was not supproted by the facts since under Section

76-2-307, the actor must voluntarily terminate his efforts prior to the commission of the offense. As will be shown in Point III, infra, the crime of theft as defined by Section 76-4-404 was completed before the goods were abandoned.

B

WHEN THE PROSECUTION'S CASE IS BASED ON BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE THE TRIAL COURT MAY PROPERLY REFUSE TO INSTRUCT THE JURY ON REASONABLE ALTERNATIVE HYPOTHESIS.

Appellant's Proposed Instruction No. 6 was not submitted to the jury. The instruction read:

> To warrant you in convicting the defendant of the crime charged in the Information, or of any crime included therein, the evidence must, to your minds, exclude every reasonable hypothesis other than that of the guilt of the defendant; that is to say, if after a full and fair consideration and comparison of all the testimony in the case you can reasonably explain the facts in evidence on any reasonable ground other than the guilt of the defendant, then you must find him not guilty.

(R.37). Appellant contends that the failure to submit the above instruction was reversible error; however, the trial court did not err because the element of intent was not based solely on circumstantial evidence.

In State v. Garcia, 11 Utah 2d 67, 355 P.2d 57 (1960), this Court dealt specifically with the matter of reasonable doubt and reasonable alternative hypothesis:

> . . . It is universally recognized that there is no jury question without substantial evidence indicating defendant's guilt beyond a reasonable doubt. This requires evidence from which the jury could reasonably find defendant guilty of all material issues of fact beyond a reasonable doubt. In applying this rule, usually with reference to the jury instructions, we have held that where the only proof of material fact or one which is a necessary element of defendant's guilt consists of circumstantial evidence, such circumstances must reasonably preclude every reasonable hypothesis of defendant's innocence. An instruction to this effect in an appropriate situation would be proper but this requires care to use language which the jury would understand and which would not merely lend to their confusion.
>
> We must keep in mind that this rule is applicable only where the proof of a material issue is based solely on circumstantial evidence. . . .

355 P.2d at 59 (emphasis added). See also State v. Bender, 581 P.2d 1019, 1021 (Utah 1978).

It should be noted that the prosecutor in this case felt that the appellant's proposed instruction may have been appropriate since he believed that the evidence was wholly circumstantial. The distinction to be made is that the instant case is not based solely on circumstantial evidence. The physical evidence introduced at trial and the testimony of Mr. Clarence Price constituted direct evidence which convinced the trial judge that the case was based on direct evidence:

> Where we have evidence here that is direct and positive, eye-witness testimony of two guys taking a suit, wrapping it in an overcoat, throwing it over their shoulder, starting to walk out the store, that is not circumstantial evidence. I don't think under the facts and circumstances of this case the reasonable hypothesis instruction is proper.

(R.163,164).

Where the evidence is not completely circumstantial, the trial judge may properly leave the determination to the jury on the basis of reasonable doubt. State v. Romero, 554 P.2d 216 (Utah 1976); State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970); State v. Hopkins, 11 Utah 2d 363, 359 P.2d 486 (1961). Even a combination of direct and circumstantial evidence would not warrant such an instruction. State v. Fort, 572 P.2d 1387, 1390, 1391 (Utah 1977).

Even assuming, arguendo, that the evidence was all circumstantial, an instruction on reasonable alternative hypothesis need not be given. In Holland v. United States, 348 U.S. 121, reh. denied 348 U.S. 932 (1954), the petitioners assailed the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than guilt. The Supreme Court admitted that there was some case law supporting that type of observation, but then stated:

> . . . the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect [citations omitted].
>
> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Supra at 139-140.

The law is primarily concerned that an accused shall be presumed innocent until proved guilty beyond a reasonable doubt. Utah Code Ann. § 76-1-501 (1953), as amended. There is no need to risk confusing the jury with instructions to the effect that if the evidence is circumstantial it must exclude every reasonable hypothesis other than guilt. If a jury, upon weighing all evidence whether circumstantial or direct, is convinced of a defendant's guilt beyond a reasonable doubt the law is satisfied.

Respondent submits that the evidence introduced at trial was direct rather than circumstantial and, at best, was a combintation of direct and circumstantial evidence; therefore, the trial court was correct in not submitting the instruction on reasonable alternative hypothesis to the jury.

POINT II

THE COURT'S INSTRUCTION NO. 10 WAS CONSTITUTIONAL SINCE IT DID NOT DEMAND THAT INTENT BE PRESUMED.

The court offered the following instruction to the jury as part of Instruction No. 10:

> . . . A person's state of mind is not always susceptible of proof by direct and positive evidence, and, if not, may ordinarily be inferred from acts, conduct, statements or circumstances.

(R.57) (emphasis added).

Appellant now contends that allowing the jury to infer intent is a denial of due process of law under the Fourteenth Amendment to the United States Constitution because it has the effect of shifting the burden of persuasion to the defendant. Appellant solely relies on Sandstrom v. Montana, ___ U.S. ___, 99 S.Ct. 2450 (1979), for this proposition.

In Sandstrom, a completely different instruction was given to the jury wherein they were told that the law presumes that a person intends the necessary and natural

outlined two types of instructions in this area that would deny due process: (1) an instruction constituting a burden-shifting presumption like that in Mullaney v. Wilbur, 421 U.S. 684 (1975), where the burden shifted to the defendant to prove that he lacked the requisite mental state; or (2) a conclusive presumption (irrebuttable) which would eliminate intent as an element of the offense and would conflict dangerously with the presjmption of innoence. Therefore, the instruction stating that "the law presumes intent" was declared unconstitutional because it could have been interpreted as either a burdenshifting presumption or a conclusive presumption. 99 S.Ct. 2459. In short, it required the jury to infer intent, effectively relieving the State of its burden of proof.

Furthermore, it is proper for a jury to infer intent from acts, conduct, statements or circumstances. In State v. Hopkins, 11 Utah 2d 486, 359 P.2d 486, this Court held:

> It is to be remembered that intent, being a state of mind, is rarely susceptible of direct proof. But it can be inferred from conduct and attendant circumstances in the light of human experience. . . .

359 P.2d at 487.

This Court also stated in State v. Romero, 554 P.2d 216, 218 (Utah 1976), that intent to steal [illegible] unlawfully deprive the rightful owners of their

property can be inferred by defendant's conduct and the attendant circumstances testified to by the witnesses. See also State v. Canfield, 18 Utah 2d 292, 422 P.2d 196, 198 (1967): "[W]e are aware of no better nor persuasive way to do it (prove what a man intended) than by showing both what he did and what he said. . . ."

In the case at bar, the jury was not directed to automatically find intent. The instruction described a permissive inference of intent rather than the type of conclusive presumption prohibited by Sandstrom. The jury was told that they "may" infer intent, therefore, the State was not relieved of any burden. The prosecution was still required to prove beyond a reasonable doubt every fact necessary to constitute the offense.

POINT III

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT OF THE COURT BELOW.

The fundamental rule governing a claim of insufficient evidence on appeal is that the evidence and all inferences fairly to be drawn therefrom must be viewed in the light most favorable to the jury's verdict. State v. Wilson, 565 P.2d 66 (Utah 1977). Viewing the evidence presented at trial in the light most favorable to the verdict, including any reasonable inferences drawn therefrom, State v. Helm, 563 P.2d 794

(Utah 1977); State v. Canfield, supra, clearly the record contains substantial evidence from which the jury could infer appellant took the suits with the requisite criminal intent.

Appellant argues that because he was not successful in leaving Z.C.M.I. with the two suits, he cannot be said to have committed the offense of theft. However, successful conversion of the goods is not an element of the offense.

In order to find guilt in the theft charge under Utah Code Ann. § 76-6-404 (1953), as amended, the jury must find that the accused obtained or exercised unlawful control over the property of another with a purpose to deprive the owner of that property. The evidence in the record and the inferences fairly drawn therefrom, viewed in the light most favorable to and supportive of the verdict are as follows:

1. The appellant entered the Z.C.M.I. store intending to deprive them of their merchandise.

2. The appellant dropped to his knees between two suit racks and stuffed two men's suits into a raincoat.

3. The appellant did not pay for the suits.

4. The appellant then attempted to leave the store with the goods.

5. The appellant was beyond the last cash register, just short of the door, when he was apprehended by security personnel.

This evidence supports a finding by the jury that the appellant exercised unauthorized control over the property with the intent to deprive thereof.

This Court in State v. Middelstat, 579 P.2d 908 at 909 (1978), stated that before it can be said that the evidence is insufficient to uphold a conviction, it must be shown that the quality of the testimony given is "so improbable that it is completely unbelievable." In this case the jury was entitled to believe or disbelieve the State's witnesses, one of which was an eye-witness to the commission of the offense. In the case of State v. Wilson, this Court stated:

> The judging of the credibility of the witnesses and the weight of the evidence is exclusively the prerogative of the jury. Consequently, we are obliged to assume that the jury believed those aspects of the evidence, and drew those inferences that reasonably could be drawn therefrom, in the light favorable to the verdict.

Id. at 68.

Furthermore, additional information in the record supports the conclusion that the elements of theft were shown. After all evidence had been presented, the appellant moved to dismiss the information charging theft

for insufficient evidence. Counsel for appellant then argued that at best the State had only shown attempted theft. The court denied the motiong stating:

> [T]he crime of theft involves not so much an act, as an intent followed by an act. It is like burglary. You enter a building with the intent to commit a theft. The fact you don't succeed in committing that theft doesn't make it any less a burglary. The crime is committed when the building is entered unlawfully for that purpose. The purpose to deprive means to have the conscious objective to do something, to deprive the owner of the property. And so when you do something with that conscious objective, the fact you don't get away with it and don't succeed in accomplishing that objective, doesn't mean that you are not guilty of the offense itself. (R.157, 158)
>
> I think when somebody wraps up two suits in a topcoat and slings them over their shoulers, thinking they are buried, and starts to walk out of the store, he is exercising unauthorized control over the property.

In sum, the evidence in this case justifies the reasonable inferences that can be drawn from the facts. That is, that the appellant went into the store, took two suits off of a rack, wrapped the suits in a raincoat and started to leave without going through the usual process when buying a suit or talking to a clerk, discussing the merchandise, or trying the suit on and without paying for the suits.

POINT IV .

THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY WAS NOT REVERSIBLE ERROR.

A.

THE REMARK WAS A PROPER RESPONSE TO DEFENSE COUNSEL'S CLOSING ARGUMENT.

Ordinarily, a prosecutor is not allowed to comment on the defendant's failure to testify. Griffith v. California, 380 U.S. 609 (1965). However, in a number of cases it has been held that a defendant cannot complain that a comment on his failure to testify was error when the remark was invited or provoked by the defendant's attorney. For example, the Eighth Circuit in Babb v. U.S., 351 F.2d 863 (1965), held that reference to the defendant's failure to take the stand made by the defendant's attorney with an explanation of such failure was an invitation to the prosecutor to respond and comment on the subject.

This Court has also held that a responsive comment on a defendant's failure to testify is not error. In State v. Boone, 581 P.2d 571 (Utah, 1978), the defense attorney referred to the court's instruction on the defendant's right not to take the stand and suggested reasons for the defendant's

decision not to take the stand. The prosecutor responded to this argument by stating that there could have been other reasons why the defendant had not testified, such as the fear of rigorous cross-examination. The Court stated:

> The reply of the prosecutor was not improper and did not emphasize the failure of the defendant to testify. That matter have been brought up by the defendant's counsel and the prosecutor was simply emphasizing one of the reasons suggested by defense counsel as to why the defendant did not take the stand.

Id. at 574.

Similarly, in this case, the defendant referred to the court's Instruction No. 6 regarding a defendant's failure to take the stand (R. 175-176). Counsel then offered an explanation for choosing not to put the defendant on the stand: that it had been counsel's decision as the defendant's attorney and that the defendant could add nothing to the evidence by testifying (R. 176).

In reply, the prosecutor did not emphasize the defendant's failure to testify, rather, the comments were merely responsive to remarks made by defense counsel. The State, contrary to the defense attorney's position, attempted to show that the defendant could have added something--he

could have revealed the reason why he did not go to the first cash register in the men's suit department (R. 187). In short, the prosecutor's response was proper and, therefore, does not require that the conviction be reversed.

B.

EVEN ASSUMING THAT THE REMARK WAS ERROR, IT WAS ONLY HARMLESS ERROR.

Assuming that the prosecutor's comment on the defendant's failure to testify was error, it was harmelss error because (1) it was harmless beyond a reasonable doubt and (2) the trial judge immediately stopped any further comment on the subject.

In Chapman v. California, 386 U.S. 18 (1967), the United States Supreme Court defined the standard for harmless error. The Court held that when a reviewing court is asked to decide if a remark pertaining to a defendant's failure to testify violates the defendant's fifth amendment privilege against self-incrimination, an error is harmless if it is harmless beyond a reasonable doubt. The Court also explained that this standard was the equivalent of the standard announced in Fahy v. Connecticut, 375 U.S. 85 (1963), that an error is harmelss unless there is a "reasonable possibility that the error complained of might have contributed to the conviction." Id. at 86, 87.

In this case, the prosecutor's comment in closing argument was harmless since the evidence was sufficient to justify conviction regardless of any reference to the defendant's failure to testify. Furthermore, the alleged error was cured by the trial judge's conduct in preventing further comment and was sufficient to cure any potential prejudice.

CONCLUSION

Respondent submits that the jury in the lower court was properly instructed on the law. A defendant is entitled to be given an instruction on his theory of the case only if there is substantial evidence to support such instruction. The appellant's supplemental Instruction No. 3 was not a correct statement of the law. In addition, an instruction on reasonable alternative hypothesis was not required in this case because of proof of intent to deprive was not solely based on circumstantial evidence. Finally, the Court's Instruction No. 10 was an accurate definition of the law because the jury may properly infer intent from particular acts, conduct, statements or circumstances.

The comments made during closing argument pertaining to the defendant's failure to testify were responsive and therefore, not reversible error. Even

assuming the remark was error, it was only harmless error because it was not prejudicial to the defendant. The evidence was sufficient to support the jury's verdict, therefore, the prosecutor's comment did not contribute to the conviction and in short, was harmless beyond a reasonable doubt.

Accordingly, respondent urges this Court to affirm the verdict of guilty rendered by the jury in the court below.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent